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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JESSIE G. AGUIRRE, ) NO. EDCV 12-01378-MAN  
Plaintiff, )  
v. ) MEMORANDUM OPINION  
CAROLYN W. COLVIN,<sup>1</sup> )  
Acting Commissioner of Social )  
Security, ) AND ORDER  
Defendant. )

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Plaintiff filed a Complaint on August 23, 2012, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's applications for disability insurance benefits ("DIB") and supplemental security income ("SSI"). On September 26, 2012, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on May 30, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for payment of benefits or, alternatively, for further administrative

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<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 proceedings; and the Commissioner requests that her decision be affirmed  
 2 or, alternatively, remanded for further administrative proceedings.

3

4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

5

6 Plaintiff, who was born on January 26, 1951, filed applications for  
 7 DIB and SSI on June 25, 2009.<sup>2</sup> (Administrative Record ("A.R.") 114-20.)  
 8 Plaintiff alleges an onset date of July 13, 2005, and claims she cannot  
 9 work because of a lower back injury and diabetes. (A.R. 146.)  
 10 Plaintiff worked from 1973, through July 2005, as a shipping and  
 11 receiving clerk. (A.R. 147.) From August 2005, through January 23,  
 12 2006, she worked as a motel desk clerk. (A.R. 41, 130.)

13

14 After the Commissioner denied plaintiff's claims initially and upon  
 15 reconsideration (A.R. 55-60, 61-65), plaintiff requested a hearing (A.R.  
 16 66-67). On April 5, 2011, plaintiff, who was not represented by counsel  
 17 or otherwise,<sup>3</sup> appeared and testified at a brief hearing before  
 18 Administrative Law Judge Mason D. Harrell (the "ALJ"). (A.R. 39-49.)  
 19 Vocational expert Corinne Porter also testified. (*Id.*) On April 22,  
 20 2011, the ALJ denied plaintiff's claims, and the Appeals Council  
 21 subsequently denied plaintiff's request for review of the ALJ's  
 22 decision. (A.R. 26-33, 1-3.) That decision is now at issue in this  
 23 action.

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26 <sup>2</sup> Plaintiff previously applied for DIB, but her application was  
 27 denied on August 30, 1991. (A.R. 142.)

28 <sup>3</sup> At the outset of the hearing, plaintiff stated that she had  
 attempted to obtain an attorney, without success. (A.R. 39-40.)

## **SUMMARY OF ADMINISTRATIVE DECISION**

The ALJ found that plaintiff last met the insured status requirements of the Social Security Act on December 31, 2008, and that she has not engaged in substantial gainful activity ("SGA") since the alleged onset date of July 13, 2005. (A.R. 28.) With respect to his step one finding, the ALJ explained as follows:

[Plaintiff] worked after the alleged disability onset date, but this work activity did not rise to the level of substantial gainful activity. The record shows [plaintiff] earned \$896.00 in 2006 [*citing* A.R. 123-24]; however, when averaged over a 12-month period, her earnings do not equate to substantial gainful activity, which was \$860.00 in 2006.

(A.R. 28.)

At step two, the ALJ found that plaintiff has the severe impairments of degenerative disc disease of the spine and degenerative joint disease of the knees. (A.R. 28.) The ALJ noted that he had considered the potential impact of plaintiff's obesity on her severe impairments, notwithstanding that plaintiff did not allege that her weight limited her in any way. (A.R. 29.) The ALJ also noted that plaintiff takes medication for high cholesterol and Type 2 Diabetes, but the ALJ found no evidence of secondary diseases other than diabetes. (*Id.*) The ALJ concluded that there is no objective evidence indicating that plaintiff's diabetes would preclude the performance of SGA within plaintiff's assessed residual functional capacity. (*Id.*) At step

1 three, the ALJ found that plaintiff does not have an impairment or  
2 combination of impairments that meet or medically equal one of the  
3 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20  
4 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and  
5 416.926). (*Id.*)

6

7 Before proceeding to step four, the ALJ determined that plaintiff  
8 has the residual functional capacity ("RFC") to perform "a narrowed  
9 range of" light work as defined in 20 C.F.R. §§ 404.1567(b) and  
10 416.967(b), "except she can occasionally bend, stoop, and twist." (A.R.  
11 29, 31-32.) The ALJ found that plaintiff: "can sit for 6 hours out of  
12 an 8-hour period with normal breaks, and she can stand and/or walk for  
13 6 hours out of an 8-hour period. [Plaintiff] can lift and/or carry 10  
14 pounds frequently and 20 pounds occasionally." (*Id.*)

15

16 The ALJ also rendered a negative credibility finding with respect  
17 to plaintiff's allegations regarding her symptoms and limitations, to  
18 wit, that plaintiff's "statements concerning the intensity, persistence  
19 and limiting effect of [her alleged] symptoms are not credible to the  
20 extent they are inconsistent with the [ALJ's] residual functional  
21 capacity assessment." (A.R. 30.) The ALJ reasoned as follows:

22

23 [Plaintiff] has described daily activities that are fairly  
24 limited. She does not drive a car, clean, do yard work or go  
25 grocery shopping [*citing* A.R. 153]. Furthermore, she alleged  
26 needing assistance to get out of bed, shower, stand, sit and  
27 walk [*citing* A.R. 174, 183]. Such a degree of limitations is  
28 inconsistent with the reports in the record. For example,

1       during an initial interview, a Social Security employee  
2       observed [plaintiff] had no difficulties sitting, standing or  
3       walking [*citing* A.R. 143]. Additionally, on her application  
4       for Supplemental Social Security Income, [plaintiff] reported  
5       needing no assistance in personal care, hygiene or upkeep of  
6       her home [*citing* A.R. 115]. [Plaintiff] has alleged having  
7       high blood pressure and headaches, but there is no objective  
8       evidence in the medical record to support these allegations.  
9       [Plaintiff] has not reported taking any medications for these  
10      conditions. Furthermore, the only blood pressure reading in  
11      the record is 100/70, which is within the normal range.  
12      [Plaintiff] has complained of shoulder pain [*citing* A.R. 172].  
13      Nonetheless, during an internal medicine consultative  
14      examination, [plaintiff] had a normal range of motion of her  
15      shoulders [*citing* A.R. 202].

16  
17 (A.R. 30.)

18  
19       In addition, the ALJ found that plaintiff's credibility was  
20      diminished with respect to the alleged severity of the symptoms she  
21      experienced based on her degenerative disc and joint diseases, because  
22      although there was objective medical evidence of lumbosacral tenderness  
23      and decreased motion, radiculopathy, and hyperalgesia, plaintiff had a  
24      normal range of motion in her cervical spine and knees, no muscle spasms  
25      or tenderness on palpation, and normal gait and balance, and there was  
26      no evidence of generalized neuropathy. (A.R. 31.) The ALJ also noted  
27      that plaintiff reported incidents of falling and having to use a cane,  
28      but the record contained no evidence that a cane was medically

1 prescribed. (*Id.*)

2

3 At step four, the ALJ determined that plaintiff is capable of  
 4 "performing past relevant work as a desk clerk, resort," because the  
 5 activities of that job -- as it was performed by plaintiff and as  
 6 generally performed in the national economy -- are not precluded by her  
 7 RFC. (A.R. 32) The ALJ determined that plaintiff's work as a motel  
 8 desk clerk for approximately six months was "past relevant work" within  
 9 the meaning of the Social Security regulations, because plaintiff  
 10 "performed it within 15 months of the date of this decision, for a  
 11 sufficient length of time to learn, provide average performance and at  
 12 the level of substantial gainful activity." (*Id.*) Based on his step  
 13 four finding, the ALJ concluded that plaintiff has not been under a  
 14 disability, as defined in the Social Security Act, from July 13, 2005,  
 15 through the date of the ALJ's decision. (A.R. 32-33.)<sup>4</sup>

16

17 **STANDARD OF REVIEW**

18

19 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
 20 decision to determine whether it is free from legal error and supported  
 21 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
 22 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant

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24 <sup>4</sup> Based on his step four finding, the ALJ did not proceed to  
 25 step five of the sequential evaluation process. Thus, he did not adduce  
 26 any evidence demonstrating, or make any finding regarding, whether other  
 27 work exists in significant numbers in the national economy that  
 28 plaintiff can do given her RFC, age, education, and work experience.  
 See 20 C.F.R. §§ 404.1512(f), 404.1560(c), 416.912(f), and 416.960(c).  
 The ALJ also did not adduce any evidence and/or make any findings  
 regarding what skills plaintiff acquired in her previous jobs and  
 whether any such skills were transferable or not. (See A.R. 39-49.)

1 evidence as a reasonable mind might accept as adequate to support a  
 2 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
 3 a mere scintilla but not necessarily a preponderance." Connett v.  
 4 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the  
 5 record can constitute substantial evidence, only those "'reasonably  
 6 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d  
 7 1063, 1066 (9th Cir. 2006) (citation omitted).

8

9       Although this Court cannot substitute its discretion for that of  
 10 the Commissioner, the Court nonetheless must review the record as a  
 11 whole, "weighing both the evidence that supports and the evidence that  
 12 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
 13 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
 14 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
 15 responsible for determining credibility, resolving conflicts in medical  
 16 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
 17 1035, 1039-40 (9th Cir. 1995).

18

19       The Court will uphold the Commissioner's decision when the evidence  
 20 is susceptible to more than one rational interpretation. Burch v.  
 21 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
 22 review only the reasons stated by the ALJ in his decision "and may not  
 23 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
 24 at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse  
 25 the Commissioner's decision if it is based on harmless error, which  
 26 exists only when it is "clear from the record that an ALJ's error was  
 27 'inconsequential to the ultimate nondisability determination.'" Robbins  
 28 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.

1 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); *see also Burch*, 400  
 2 F.3d at 679.

3

4 **DISCUSSION**

5

6 Plaintiff claims that the ALJ committed legal error in two  
 7 respects. First, plaintiff contends that the ALJ's step four finding  
 8 -- *i.e.*, that plaintiff's approximately six months of work as a motel  
 9 desk clerk is "past relevant work" she is capable of performing, thus  
 10 precluding a finding of disability -- is erroneous, because her earnings  
 11 were too low to constitute SGA, as the ALJ earlier found at step one.  
 12 (Joint Stipulation ("Joint Stip.") at 4-9, 12-15.) Second, plaintiff  
 13 contends that the ALJ improperly discounted plaintiff's credibility.  
 14 (*Id.* at 15-23, 27.)

15

16 **I. The ALJ Erred At Step Four.**

17

18 At step one, an ALJ considers whether the claimant is engaged in  
 19 "substantial gainful activity." *See* 20 C.F.R. §§ 404.1520(a)(4)(i),  
 20 416.920(a)(4)(i) ("At the first step, we consider your work activity, if  
 21 any. If you are doing substantial gainful activity, we will find that  
 22 you are not disabled"); *see also Corrao v. Shalala*, 20 F.3d 943, 946  
 23 (9th Cir. 1994) (at step one, the Commissioner "must determine whether  
 24 the claimant is currently performing 'substantial gainful activity'; if  
 25 so, the claimant will be found not disabled 'regardless of [his] medical  
 26 condition or [his] age, education, and work experience'"). At step  
 27 four, an ALJ considers whether a claimant, in light of the assessed RFC,  
 28 can perform her "past relevant work." *See* 20 C.F.R. §§

1 404.1520(a)(4)(iv), 416.920(a)(4)(iv). For prior work activity to  
2 qualify as "past relevant work" for purposes of the step four analysis,  
3 the Commissioner must find that the prior work activity "was substantial  
4 gainful activity." 20 C.F.R. §§ 404.1560(b)(1), 416.960(b)(1); *see also*  
5 Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2001) ("A job qualifies as  
6 past relevant work only if it involved substantial gainful activity.").

7  
8 Plaintiff ceased working her longtime job as a warehouse shipping  
9 and receiving clerk in July 2005, following an injury. (A.R. 45, 155.)  
10 Thereafter, from August 2005, through January 23, 2006, she worked as a  
11 desk clerk at a motel in Arizona. (A.R. 41, 130.) She worked six hours  
12 a day, seven days a week, although she would be sent home if it was  
13 slow. (A.R. 45.) Plaintiff stopped performing the motel desk clerk  
14 job, because she lives with her daughter and her daughter was  
15 transferred to California. (A.R. 41-42.) She applied for another desk  
16 job, but was told she lacked experience. (A.R. 42.)

17  
18 Plaintiff argues that the motel desk clerk job does not qualify as  
19 "past relevant work," because the low level of her earnings precludes  
20 finding this job to constitute "substantial gainful activity." (Joint  
21 Stip. at 5-8.) As plaintiff correctly notes, the ALJ, at step one,  
22 expressly determined that plaintiff's earnings as a motel desk clerk  
23 were insufficient to "rise to the level of substantial gainful  
24 activity." (*Id.* at 6-7; *see also* A.R. 28, the ALJ's finding that  
25 plaintiff "has not engaged in substantial gainful activity since July  
26 13, 2005," her alleged onset date.)

27  
28 Plaintiff made \$650 a month from August through December 2005, and

1 she made \$896 in January 2006. (A.R. 124, 131.) According to the  
 2 Social Security Administration ("SSA") website, the baseline earnings  
 3 amount (sighted individuals) for SGA was \$830 per month in 2005 and \$860  
 4 per month in 2006. (See Joint Stip., Ex. 1;  
 5 <http://www.ssa.gov/OACT/COLA/sga.html>.) Plaintiff's \$650 monthly income  
 6 as a motel desk clerk during the last five months of 2005 fell below the  
 7 requisite baseline amount for SGA. Even though plaintiff earned \$896 in  
 8 January 2006, as the ALJ recognized (A.R. 28), this amount, when  
 9 averaged over a 12-month period, falls well below the \$860 SGA baseline  
 10 amount.

11

12 Based on these earnings levels, the ALJ correctly found, at step  
 13 one, that plaintiff's income as a motel desk clerk for six months after  
 14 her alleged disability onset date was too low to satisfy the SSA's  
 15 requirements for SGA. (A.R. 28.)<sup>5</sup> Nonetheless, the ALJ found, at step  
 16 four, that this same motel desk clerk job constituted "past relevant  
 17 work" on the ground that plaintiff's RFC did not preclude performing  
 18 this job and plaintiff "performed [the desk clerk job] within 15 years  
 19 of the date of this decision, for a sufficient length of time to learn,  
 20 provide average performance and at the level of substantial gainful  
 21 activity." (A.R. 32.)

22

23 Ignoring the potentially inconsistent nature of the ALJ's step one  
 24 and step four findings, the Commissioner argues that no error occurred,  
 25 because the ALJ was entitled to find that plaintiff's motel desk clerk

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26  
 27 <sup>5</sup> Prior to the ALJ's decision, SSA interviewer J. Gaul noted:  
 28 "[Plaintiff] tried to continue working in a different field. She was  
 not able to earn over SGA and did not continue for more than 6 months.  
 I recommend using the alleged onset date." (A.R. 137.)

1 work constituted SGA and, thus, was past relevant work. Relying on 20  
2 C.F.R. §§ 404.1510, 404.1574(a)(1), 416.910, and 416.974(a)(1), the  
3 Commissioner argues that, regardless of a claimant's earnings level,  
4 prior work will constitute SGA as long as it involves doing significant  
5 and productive physical or mental duties and is done for pay or profit,  
6 and that plaintiff's duties as a motel desk clerk satisfy these  
7 requirements. (Joint Stip. at 10-11.)

8

9 The Commissioner's argument fails, because it disregards the SSA's  
10 regulations as a whole, as well as the governing caselaw regarding the  
11 Commissioner's burden of proof at step four. The regulations on which  
12 the Commissioner relies merely set forth general language regarding what  
13 type of activity will be deemed to constitute both substantial and  
14 gainful "work" activity, as opposed to other activities, such as school  
15 attendance or household tasks. See 20 C.F.R. §§ 404.1572(c),  
16 416.972(c). While insubstantial earnings will not necessarily establish  
17 an inability to engage in SGA, the regulations make clear that the SSA's  
18 "primary consideration" in determining if work activity is SGA "will be  
19 the earnings" the claimant derived from such work activity. 20 C.F.R.  
20 §§ 404.1574(a)(1), 416.974(a)(1). Further:

21

22 If your average monthly earnings are equal to or less than the  
23 amount(s) determined under paragraph (b)(2) of this section  
24 for the year(s) in which you work, we will generally consider  
25 that the earnings from your work as an employee . . . will  
26 show that you have not engaged in substantial gainful  
27 activity. We will generally not consider other information in  
28 addition to your earnings except in the circumstances

described in paragraph (b) (3) (ii) of this section.

20 C.F.R. §§ 404.1574(b)(3)(i), 416.974(b)(3)(i).<sup>6</sup>

In short, when low earnings are shown, the SSA's regulations establish a "presumption" that prior work was not SGA, and that presumption "shifts the step-four burden of proof from the claimant to the Commissioner." Lewis, 236 F.3d at 515; *see also Le v. Astrue*, 540 F. Supp. 2d 1144, 1149 (C.D. Cal. 2008) ("There is a rebuttable presumption that the employee either was or was not engaged in SGA if his or her average monthly earnings are above or below a certain amount established by the Commissioner's Earnings Guidelines.") (citing 20 C.F.R. §§ 404.1574(b)(2)-(3) & 416.974(b)(2)-(3)). "With the presumption, the claimant has carried his or her burden unless the ALJ points to substantial evidence, aside from earnings, that the claimant has engaged in substantial gainful activity." Lewis, 236 F.3d at 516.

In Lewis, the claimant periodically worked up to 20 hours a week at McDonald's after his alleged disability onset date and for a year prior to the hearing, but by the time of the hearing, his hours had been cut back, and he worked there no more than ten hours a week. His earnings always averaged an amount well less than the SGA baseline amounts. 236 F.3d at 507-08, 515 n.11. At step one, the ALJ found that this ten hour a week job did not constitute SGA, apparently based on the low level of the claimant's earnings. *Id.* at 507-08. At step four, the ALJ

<sup>6</sup> Subpart (b)(3)(ii) is implicated only if there is "evidence indicating that [the claimant] may be engaging in substantial gainful activity or that [the claimant is] in a position to control when earnings are paid or the amount of wages paid."

1 concluded that the claimant's 20 hours per week work at McDonald's was  
2 SGA and constituted past relevant work he could still perform with his  
3 assessed RFC. *Id.* at 508, 515. The Ninth Circuit found that the step  
4 four determination was improper given the "presumption" triggered by the  
5 claimant's low earnings. The Ninth Circuit noted that, when such a  
6 presumption arises, the SSA regulations list five factors to be  
7 considered in assessing whether the prior work constitutes SGA,  
8 including "the nature of the claimant's work, how well the claimant does  
9 the work, if the work is done under special conditions, if the claimant  
10 is self-employed, and the amount of time the claimant spends at work."  
11 *Id.* at 515-16 (citing 20 C.F.R. §§ 404.1573, 416.973). The Ninth  
12 Circuit found that the evidence cited by the ALJ to support his step  
13 four finding was not substantial and was inadequate to overcome the  
14 presumption raised by the claimant's low earnings. *Id.* at 516.

15  
16 Plaintiff's earnings as a motel desk clerk fell below the SSA's  
17 baseline amounts for SGA, as the ALJ recognized at step one. Thus, a  
18 presumption arose that her motel desk clerk work was *not* SGA for  
19 purposes of the step four past relevant work question, which the  
20 Commissioner was required to rebut. The Commissioner's argument is  
21 fatally flawed in two respects. First, the Commissioner completely  
22 disregards the effect of plaintiff's low earnings level, contrary both  
23 to her own regulations and governing case law. Second, the  
24 Commissioner's argument rests on what the ALJ could have done but did  
25 not do, *i.e.*, how the ALJ could have assessed the evidence of record and  
26 the findings he could have made to rebut the governing presumption that  
27 plaintiff's motel desk clerk job was not SGA.

28

1       The ALJ did not address the 20 C.F.R. §§ 404.1573 and 416.973  
 2 factors cited in Lewis. The ALJ did not cite any evidence of record to  
 3 support his finding that plaintiff's job as a motel desk clerk  
 4 constituted substantial gainful activity and past relevant work.  
 5 Although the ALJ alluded vaguely to plaintiff's "documented vocational  
 6 background and the testimony of the vocational expert" (A.R. 32), he did  
 7 not identify particular testimony or documentary evidence that would  
 8 render the desk clerk job substantial gainful activity regardless of  
 9 plaintiff's below baseline amount earnings.<sup>7</sup> Rather, the ALJ simply  
 10 conclusorily parroted the regulatory definition of "past relevant work"  
 11 set forth in 20 C.F.R. §§ 404.1560(b)(1) and 416.960(b)(1), *to wit*, work  
 12 that was done within the prior 15 years, lasted long enough for the  
 13 claimant to learn to do it, and was substantial gainful activity. (A.R.  
 14 32, stating only that plaintiff's job as a motel desk clerk constitutes  
 15 past relevant work, because plaintiff "performed it within 15 years of  
 16 the date of this decision, for a sufficient length of time to learn,  
 17 provide average performance and at the level of substantial activity.")

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18

19       <sup>7</sup> The vocational expert asked plaintiff two questions about her motel  
 20 desk clerk job, *i.e.*, whether plaintiff simply booked motel guests over  
 21 the phone or also checked them in when they arrived, and whether she sat  
 22 while doing so. Plaintiff clarified that she did not book reservations  
 23 and that she sat and occasionally stood. (A.R. 46-47.) That exchange  
 24 did not adduce any information pertinent to resolving the SGA issue.  
 25 (A.R. 46-47.) The ALJ posed a single hypothetical to the vocational  
 26 expert and asked the expert if the hypothetical's subject could perform  
 27 the desk clerk job. (A.R. 47-48.) Again, however, this brief exchange  
 28 did not adduce any evidence bearing on the SGA issue.

29       Respondent notes that the ALJ stated that plaintiff "answered  
 30 telephones, gave room keys to customers and occasionally cleaned rooms"  
 31 and referenced the DOT classification for desk clerk, resort. (A.R.  
 32.) Respondent, however, overlooks that these brief comments were made  
 33 in the context of the ALJ's explanation of why plaintiff's RFC did not  
 34 preclude her from performing the prior motel desk clerk job; they  
 35 plainly did not reflect any findings by the ALJ that the prior work was  
 36 substantial gainful activity within the meaning of 20 C.F.R. §§  
 37 404.1572-414.1573 and 416.972-416.973.

1       The ALJ gave no indication that he recognized the presumption  
2 triggered by his step one finding that plaintiff's motel desk clerk job  
3 was not SGA, because her earning were too low. He made no effort to  
4 reconcile that finding with his facially inconsistent step four finding  
5 that the job was performed at the level of substantial gainful activity.  
6 Indeed, he made no effort to meet the Commissioner's burden of pointing  
7 to substantial evidence that plaintiff engaged in substantial gainful  
8 activity during the approximately six months period of her motel desk  
9 clerk work. The Commissioner's arguments about why the prior motel desk  
10 clerk job was "substantial" and "gainful" activity are after-the-fact;  
11 they do not reflect any findings actually made by the ALJ, and they are  
12 post hoc rationalizations which this Court may not entertain. *See*,  
13 *e.g.*, Orn, 495 F.3d at 630 ("We review only the reasons provided by the  
14 ALJ in the disability determination and may not affirm on a ground upon  
15 which he did not rely"); *see also* Barbato v. Comm'r of Soc. Sec. Admin.,  
16 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996) (remand is not precluded  
17 "even if [the Commissioner] can offer proper post hoc explanations" for  
18 the ALJ's findings, because "the Commissioner's decision must stand or  
19 fall with the reasons set forth in the ALJ's decision, as adopted by the  
20 Appeals Council").

21  
22       The ALJ's step four finding that plaintiff's motel desk clerk job  
23 was past relevant work is not supported by substantial evidence, because  
24 the ALJ failed to rebut the presumption that the work was not SGA due to  
25 plaintiff's low earning levels. Because the ALJ failed to set forth  
26 adequate reasons to establish that plaintiff's work as a motel desk  
27 clerk was SGA, then under the SSA's regulations, it could not constitute  
28 "past relevant work." *See* 20 C.F.R. §§ 404.1560(b)(1), 416.960(b)(1).

1 The ALJ's step four finding is inconsistent with 20 C.F.R. §§  
 2 404.1560(b)(1) and 416.960(b)(1), and he should have proceeded to step  
 3 five. *See Eksund v. Astrue*, 343 Fed. Appx. 228, 229 (9th Cir. Aug. 19,  
 4 2009) (when the Commissioner found that the claimant "had 'not engaged  
 5 in substantial gainful activity in the past'" and failed to point to  
 6 substantial evidence that, despite her low earnings, the claimant had  
 7 engaged in SGA, the ALJ's finding at step four that she was disabled was  
 8 improper and a step five analysis was required). Because the ALJ's step  
 9 four finding is not supported by substantial evidence and is not free of  
 10 legal error, reversal is required.<sup>8</sup>

11

12 **II. The ALJ Erred In Assessing Plaintiff's Credibility.**

13

14 Once a disability claimant produces objective medical evidence of  
 15 an underlying impairment that is reasonably likely to be the source of  
 16 claimant's subjective symptom(s), all subjective testimony as to the  
 17 severity of the symptoms must be considered. *Moisa v. Barnhart*, 367  
 18 F.3d 882, 885 (9th Cir. 2004); *Bunnell v. Sullivan*, 947 F.2d 341, 345  
 19 (9th Cir. 1991); *see also* 20 C.F.R. §§ 404.1529(a), 416.929(a)  
 20 (explaining how pain and other symptoms are evaluated). "[U]nless an  
 21 ALJ makes a finding of malingering based on affirmative evidence  
 22 thereof, he or she may only find an applicant not credible by making  
 23 specific findings as to credibility and stating clear and convincing

24

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25 <sup>8</sup> The ALJ's step four error cannot be considered harmless, because  
 26 the record is devoid of evidence sufficient to afford a basis for  
 27 resolving the step four issue. For example, the ALJ failed to adduce  
 28 evidence regarding how well plaintiff performed her motel desk clerk  
 job, the conditions in which she performed it, etc.. The ALJ barely  
 asked plaintiff about the job and the vocational expert's questions were  
 brief and inadequate to provide the information needed to rebut the  
 presumption triggered by plaintiff's low earnings.

1 reasons for each." Robbins, 466 F.3d at 883. The factors to consider  
2 in weighing a claimant's credibility include: (1) the claimant's  
3 reputation for truthfulness; (2) inconsistencies either in the  
4 claimant's testimony or between the claimant's testimony and his  
5 conduct; (3) the claimant's daily activities; (4) the claimant's work  
6 record; and (5) testimony from physicians and third parties concerning  
7 the nature, severity, and effect of the symptoms of which the claimant  
8 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
9 2002); see also 20 C.F.R. § 416.929(c).

10

11 Here, the ALJ found that, "[a]fter careful consideration of the  
12 evidence, . . . [plaintiff]'s medically determinable impairments could  
13 reasonably be expected to cause the alleged symptoms." (A.R. 30.)  
14 Further, the ALJ cited no evidence of malingering by plaintiff.  
15 Nonetheless, the ALJ concluded that plaintiff's "statements concerning  
16 the intensity, persistence and limiting effects of [her] symptoms are  
17 not credible" to the extent they varied from the ALJ's own RFC  
18 assessment. (Id.) Accordingly, the ALJ's reasons for finding that  
19 plaintiff was not credible with respect to her subjective symptom and  
20 pain testimony must be "clear and convincing."

21

22 Plaintiff testified that pain in her back and legs prevented her  
23 from working as of the hearing's date. (A.R. 42.) She indicated that  
24 she cannot stand and walk all day long, can only occasionally bend,  
25 stoop, or twist, does not walk up the stairs, and is careful when she  
26 walks because her knees buckle without warning, resulting in nine falls  
27 in the span of four months. (A.R. 43-44.) Plaintiff also testified  
28 that she wishes she was not in so much pain, because she loves to work.

1 (A.R. 45.)

2

3 On an exertion questionnaire dated July 7, 2009, plaintiff reported  
4 that her back was in a lot of pain, rendering her unable to sit, stand,  
5 or lie down for long periods of time. (A.R. 152.) She indicated that  
6 her legs and arms are numb and that her knees give out. (*Id.*) She can  
7 only walk about 100 feet before feeling pain in her back, and she  
8 carries only small, light things. (A.R. 152-53.) She reported that she  
9 does not do her own grocery shopping, does not clean her own area, does  
10 not drive, and completes no yard work. (A.R. 153.) Later, on a  
11 disability report dated October 30, 2009, plaintiff reported a worsening  
12 of her condition since her last report in June 2009, which began in  
13 August, including daily headaches, continued pain in the lower back,  
14 right leg and right side. (A.R. 172.)

15

16 The ALJ discounted plaintiff's testimony and credibility for the  
17 following reasons: (1) inconsistencies exist between plaintiff's  
18 reported daily activities and what she reported on her application for  
19 SSI and an SSA employee's observations during plaintiff's initial  
20 interview; (2) there is no objective medical evidence to support  
21 plaintiff's allegations of high blood pressure, headaches, and shoulder  
22 pain; and (3) the severity of plaintiff's symptoms/pain is not supported  
23 by the medical evidence, which shows a normal range of motion for her  
24 spine and knees, no neuropathy in her lower extremities, no muscle  
25 spasms, and normal gait and balance. (A.R. 30-31.) For the following  
26 reasons, the Court finds that the reasons the ALJ provided for  
27 discounting plaintiff's symptom/pain testimony and credibility are not  
28 clear and convincing.

1       To support his first reason for discounting plaintiff's  
 2 credibility, the ALJ noted that plaintiff's SSI application indicated  
 3 that she does not "need help in personal care, hygiene or upkeep of a  
 4 home" (A.R. 115), and further, in June 25, 2009, an SSA field  
 5 representative observed that plaintiff appears "to be perfectly normal,"  
 6 because the employee did not observe plaintiff to have difficulty  
 7 walking, standing, sitting, etc. (A.R. 143-44). (A.R. 30.) Although  
 8 there is a facial inconsistency between this evidence and plaintiff's  
 9 reports that she needs help taking care of herself (A.R. 174, 183), this  
 10 discrepancy is explained by the fact that, about a month after plaintiff  
 11 indicated she needed no help in June 2009, and appeared "perfectly  
 12 normal" she reported a worsening of her condition. (A.R. 172.) Her  
 13 later reports -- in October 2009, and April 2010 -- of needing  
 14 assistance doing daily activities, like showering and household chores  
 15 (A.R. 174, 183), thus, have an explanation in the record.<sup>9</sup> The ALJ,  
 16 however, ignored this evidence of record -- that undermined his finding  
 17 -- which was improper. An ALJ may not, as he did here, reach a  
 18 conclusion and then justify it by ignoring competent evidence in the  
 19 record that would suggest an opposite result. Gallant v. Heckler, 753  
 20 F.2d 1450, 1456 (9th Cir. 1984); *see also Erickson v. Shalala*, 9 F.3d  
 21 813, 817 (9th Cir. 1993) (ALJ must consider "all factors" that might  
 22 have a significant impact on claimant's ability to work); Therefore,  
 23 the ALJ's finding that plaintiff is not credible due to purported  
 24 inconsistencies related to her daily activities is not convincing.

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25  
 26       <sup>9</sup> Furthermore, the Court notes that besides the timing of the SSA  
 27 field representative's observation, it is also not persuasive evidence  
 28 that plaintiff is lying, because there is no evidence of how long the  
 representative observed plaintiff and under what conditions, and in any  
 event, there is no indication this SSA employee has the appropriate  
 knowledge and training to assess plaintiff's alleged disabilities.

1       The ALJ next discounted plaintiff's credibility on the ground that,  
 2 although she alleged having high blood pressure and headaches, there was  
 3 no objective evidence to support these allegations. (A.R. 30.) The ALJ  
 4 stated that the "only blood pressure reading" in the record was 100/70,  
 5 within the normal range. (*Id.*) This blood pressure reading, however,  
 6 in only one piece of the evidence. Not only does the record show that  
 7 plaintiff comes from a family with a history of high blood pressure  
 8 (A.R. 200), but it also contains evidence that on at least one office  
 9 visit in March 2010, plaintiff's blood pressure reading was 150/100,  
 10 well above the normal range (A.R. 221), on another in April 2008, it was  
 11 133/80, slightly above the normal range (A.R. 227), and in March 2008,  
 12 her blood pressure reading was 132/80, again slightly above the normal  
 13 range (A.R. 230). The record, thus, does not support the ALJ's  
 14 characterization that plaintiff had normal blood pressure during the  
 15 entire period in question, and his second reason also is not  
 16 convincing.<sup>10</sup>

17  
 18       The ALJ also found that plaintiff was not credible, because  
 19 although she reported shoulder pain in October 2009 (A.R. 172), three  
 20 months earlier (in July 2009), a consultative examiner found that  
 21 plaintiff had a normal range of motion in her shoulders (A.R. 202).  
 22 (A.R. 30.) This reason is not convincing, because again, the ALJ

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23  
 24       <sup>10</sup> The medical evidence shows that additional, higher blood pressure  
 25 readings occurred before the ALJ rendered his decision. This evidence  
 26 was submitted to the Appeals Council after the ALJ issued his decision  
 27 (A.R. 215) and was relevant to the Appeals Council's review. 20 C.F.R.  
 28 § 404.976(b), 416.1476(b). This Court must consider both the ALJ's  
 decision and this additional evidence submitted to the Appeals Council  
 to determine whether the Commissioner's "final decision" is supported by  
 substantial evidence and free of legal error. Ramirez v. Shalala, 8  
 F.3d 1449, 1451-52 (9th Cir. 1993).

1 ignored that plaintiff reported a worsening of her condition beginning  
 2 in August 2009. There is no evidence of record demonstrating that  
 3 plaintiff exhibited a normal range of motion in her shoulders after her  
 4 condition allegedly worsened in August 2009. Perhaps more importantly,  
 5 the crux of plaintiff's condition that prevents her from working, as the  
 6 ALJ found, is degenerative disc disease of the spine and degenerative  
 7 joint disease of the knees. (A.R. 28.) Plaintiff's disability report  
 8 from July 7, 2009, only 12 days after she filed for benefits, states  
 9 that she cannot sit, stand or walk too long and that she has a lower  
 10 back injury. (A.R. 146.) Plaintiff's exertion questionnaire dated July  
 11 7, 2009, confirms that plaintiff's claim of disability is based on her  
 12 back and knee problems, not on any claim of disabling shoulder pain.  
 13 (A.R. 152-54.) The ALJ's discounting of plaintiff's credibility based  
 14 on her shoulder complaints, therefore, is not convincing.<sup>11</sup>

15  
 16 Finally, the ALJ discounted plaintiff's testimony about her  
 17 symptoms and pain on the ground that the medical evidence showed a  
 18 normal range of motion for her spine and knees, no neuropathy in her  
 19 lower extremities, no muscle spasms, and normal gait and balance.<sup>12</sup>

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20  
 21 <sup>11</sup> For the same reasons, the ALJ's finding that plaintiff is not  
 22 credible, because there was no objective medical evidence supporting  
 23 plaintiff's complaints of headaches (A.R. 30), fails. Plaintiff first  
 24 started complaining about headaches in October 2009 (A.R. 167, 172),  
 after all the medical examinations on which the ALJ relies occurred. In  
 any event, the crux of plaintiff's condition is her knee and back pain,  
 and not, at least at the time of her application, debilitating  
 headaches.

25  
 26 <sup>12</sup> The ALJ also remarked that plaintiff "reported that she falls and  
 27 uses a cane, but there is no objective evidence the cane was medically  
 28 prescribed" (A.R. 31), and apparently considered this a basis to find  
 her not credible. However, plaintiff never indicated that the cane was  
 prescribed by a doctor, only that she was walking with one after  
 falling. (A.R. 181.) Simply because a cane was not prescribed does not  
 mean that plaintiff did not fall, as she stated, and/or that she did not

1 (A.R. 31.) Significantly, there was medical evidence supportive of  
 2 plaintiff's subjective symptom testimony, some of which the ALJ  
 3 acknowledged in connection with his adverse credibility finding,  
 4 including: tenderness in the spine with decreased range of motion;  
 5 multiple MRI examinations showing a range of degenerative changes,  
 6 including disc space narrowing at L5-S1 and osteophytosis in the spine  
 7 and joint space narrowing; indications of radiculopathy; and a positive  
 8 straight leg raising test. (*Id.*) The ALJ failed to explain why this  
 9 evidence supporting plaintiff's pain allegations was not probative  
 10 and/or was not given more weight. *See Reddick v. Chater*, 157 F.3d 715,  
 11 722-23 (9th Cir. 1998) (it is impermissible for an ALJ to develop  
 12 evidentiary basis by "not fully accounting for the context of materials  
 13 or all parts of the testimony and reports"). Even assuming this  
 14 evidence did not confirm the existence of plaintiff's pain, it is well  
 15 established that an ALJ may not discredit a claimant's testimony of pain  
 16 and deny disability benefits solely because the degree of pain alleged  
 17 by the claimant is not supported by objective medical evidence.  
 18 *Bunnell*, 947 F.2d at 346-47. Thus, the ALJ's final reason for  
 19 discrediting plaintiff's symptom/pain testimony and her credibility  
 20 because of a lack of objective medical evidence is not convincing.

21  
 22 None of the reasons cited by the ALJ for finding plaintiff to lack  
 23 credibility with respect to her claimed symptoms and pain is legally  
 24 adequate. Accordingly, the ALJ's adverse credibility finding is not  
 25 supported by substantial evidence and is reversible error.

26  
 27  
 28 use a cane. Devaluing plaintiff's credibility on this basis is  
 unconvincing and erroneous.

1        III. Remand Is Required.  
2

3        The decision whether to remand for further proceedings or order an  
4 immediate award of benefits is within the district court's discretion.  
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.2000). Where no useful  
6 purpose would be served by further administrative proceedings, or where  
7 the record has been fully developed, it is appropriate to exercise this  
8 discretion to direct an immediate award of benefits. *Id.* at 1179  
9 ("[T]he decision of whether to remand for further proceedings turns upon  
10 the likely utility of such proceedings."). However, where there are  
11 outstanding issues that must be resolved before a determination of  
12 disability can be made, and it is not clear from the record that the ALJ  
13 would be required to find the claimant disabled if all the evidence were  
14 properly evaluated, remand is appropriate. *Id.* at 1179-81.

15  
16        As noted earlier, the ALJ stopped the sequential evaluation process  
17 at step four, at which he failed to make adequate findings regarding  
18 whether plaintiff's motel desk clerk job constituted SGA and past  
19 relevant work. The ALJ did not adduce any evidence about, much less  
20 make any findings regarding, what skills plaintiff acquired in her prior  
21 jobs and whether any such skills are transferrable to any other jobs  
22 existing in significant numbers in the national economy that plaintiff  
23 could do given her RFC, age, education, and work experience. Additional  
24 evidence, including from a medical expert and/or a vocational expert,  
25 likely will be needed to resolve these issues. The Court concludes that  
26 there are outstanding issues that must be resolved before a  
27 determination of disability can be made, including with respect to the  
28

1 applicability (or not) of the Grids.<sup>13</sup>

2

3 Remand is the appropriate remedy so that the above-mentioned errors  
 4 may be rectified. *See, e.g., Bunnell v. Barnhart*, 336 F.3d 1112, 1115-  
 5 16 (9th Cir. 2003) (finding that it was appropriate to decline to credit  
 6 the plaintiff's subjective symptom testimony as true, despite the ALJ's  
 7 failure to provide adequate reasons for discrediting it, when several  
 8 outstanding issue remained unresolved); *Harman*, 211 F.3d at 1180  
 9 (finding that remand, rather than an award of benefits, was warranted  
 10 despite the ALJ's improper treatment of a treating physician's opinion,  
 11 because, *inter alia*, the ALJ had not had the opportunity to consider  
 12 evidence that was submitted to the Appeals Council); *Dodrill v. Shalala*,  
 13 12 F.3d 915, 918 (9th Cir. 1993) (ordering remand so that the ALJ could  
 14 articulate specific and appropriate findings, if any existed, for  
 15 rejecting the claimant's subjective pain testimony). On remand, the ALJ  
 16 must revisit his step four finding. If, after making appropriate  
 17 findings consistent with the Commissioner's burden (*i.e.*, resulting from  
 18 the presumption that arose due to plaintiff's low earnings), the ALJ  
 19 concludes that plaintiff's motel desk clerk job is not past relevant  
 20 work, the ALJ must proceed to step five. In addition, the ALJ must  
 21 revisit plaintiff's symptom/pain testimony and either credit plaintiff's  
 22 testimony or give clear and convincing reasons why plaintiff's testimony

23

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24 <sup>13</sup> Plaintiff argues that Table No. 2 of the Grids -- specifically, 20  
 25 C.F.R., Part 404, Subpart P, Appendix 2, medical-Vocational Guidelines  
 26 §§ 202.04 and/or 202.06 -- applies to her and mandates a finding of  
 27 disability. However, the rules she cites apply only if there is a  
 28 finding that skills obtained from prior work experience are not  
 transferrable, and no such evidence has been adduced or finding made on  
 this issue. Moreover, plaintiff's inability to identify which of these  
 two rules would apply to her only underscores the fact that outstanding  
 issues remain.

1 is not credible. After so doing, the ALJ may need to reassess  
2 plaintiff's RFC, in which case additional testimony from a vocational  
3 expert likely will be needed to determine what work, if any, plaintiff  
4 can perform.

5

6 **CONCLUSION**

7

8 Accordingly, for the reasons stated above, IT IS ORDERED that the  
9 decision of the Commissioner is REVERSED, and this case is REMANDED for  
10 further proceedings consistent with this Memorandum Opinion and Order.  
11 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of  
12 this Memorandum Opinion and Order and the Judgment on counsel for  
13 plaintiff and for defendant.

14

15 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

16  
17  
18 DATED: September 3, 2013

*Margaret A. Nagle*  
19 \_\_\_\_\_  
20 MARGARET A. NAGLE  
21 UNITED STATES MAGISTRATE JUDGE  
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